No. 16,147

IN THE

United States Court of Appeals

For the Ninth Circuit

WILL M. GILLIS,
Appellant,

vs.

MINERS AND MERCHANTS BANK OF ALASKA, a Corporation,
Appellee.

Upon Appeal from the District Court for Alaska, Second Division.

BRIEF FOR APPELLEE.

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OPINION BELOW.

There was no formal opinion as such. However, the court below did render an oral decision from the bench, and a transcript of this is found at R. 113-122.

JURISDICTION.

This is an action brought by appellant for the recovery of money, alleged to have been converted to appellee's use, and for damages purportedly arising by reason of such conversion (R. 6-13). Appellee filed

its counterclaims against appellant alleging claims for money damages on the theory of restitution and unjust enrichment (R. 14-43). On June 30, 1958 summary judgment was entered in favor of appellee for the sum of $11,225.00, plus interest and costs, denying all relief sought by appellant, and dismissing appellant's cause of action (R. 122-124). An appeal from this judgment was taken by appellant on July 17, 1958 by filing with the District Court notice of appeal (R. 124). The District Court had jurisdiction by reason of the provisions of the Act of June 6, 1900 (31 Stat. 322, as amended), 48 USCA Sec. 101. The jurisdiction of this court rests on the Act of June 25, 1948 (62 Stat. 929, as amended), 28 USCA Sec. 1291, and on the Act of July 7, 1958 (Public Law 85-508, 72 Stat. 348-349, Sections 12-14).

STATEMENT.

The bare "Statement of Facts" made in appellant's brief (pp. 1-3) does not really present a factual background sufficient to enable this court to decide the questions presented here. Moreover, the statement is not accurate; and appellee will point out in part 1 of its argument (*infra,* pp. 15-21) that the impression left by appellant's statement—that there was gross error and arbitrary conduct on the part of the District Court—is false.

The situation here is somewhat involved. But appellee believes that the following, more detailed state-

ment must be set forth as being essential to a proper determination of the case.

PRELIMINARY CONSIDERATIONS.

The appellant had certain monies due him from the City of Nome, and on March 21, 1957, he assigned all of such monies to the appellee.[1] The assignment was, in effect, a security device; appellee was to advance monies on behalf of appellant, and when the assigned funds were received from the City, appellee had the authority and means to reimburse itself.

Out of the total monies so received by appellee from the City, appellee reimbursed itself to the extent of such advances made, and then paid the balance over to appellant—with the exception of $11,225.00. This money is presently being held in a "suspense account" of the appellee Bank, in the form of a cashier's check payable to appellee and appearing to have been purchased by appellant: "to pay for advance by Bank on Wallace judgment, i.e., purchase of North Star note."[2]

On November 30, 1957, appellant commenced this action to recover the $11,225.00. In addition, he asserted in his complaint a claim for compensatory damages in the sum of $25,000.00 (R. 3-5).

Appellee moved to dismiss the complaint for a failure to state a claim (R. 6), and on February 28, 1958 this court granted appellee's motion (R. 125-130).

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[1]Manning deposition (R. 68, 78-80).

[2]Manning deposition (R. 69-71, 81-82).

However, appellant was given leave to amend, and an amended complaint was subsequently filed (R. 6-13).

Appellee then served and filed its answer to the amended complaint—asserting three separate counterclaims against appellant. The gist of these, so far as the $11,225.00 is concerned, is that appellee is entitled to retain this money and use it as a set-off against a claim which appellee had against appellant.

The relevant and material facts which form the basis for appellee's counterclaims must be considered. In chronological order they are as follows:

1. The North Star-Gillis Note and Mortgage.

Robert H. Renshaw and Ernest H. Gustafson were and are co-partners, doing business under the name and style of "North Star Bakery." For purposes of convenience they will be hereafter referred to collectively as "North Star." Also, for purposes of convenience, appellant will be referred to as "Gillis", and appellee, as the "Bank."

There were certain business transactions between North Star and Gillis, and these culminated, on September 15, 1954, in the following:

(a) North Star executed and delivered to Gillis the former's promissory note in the principal sum of $19,854.83, plus 8% interest. This note was payable in installments—the first being due on September 15, 1957. However, interest was payable monthly from the date of the note, i.e., on each month subsequent to September 15, 1954.[3]

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[3]Gustafson deposition (R. 86-88, 27-28).

(b) At the same time, as security for this debt, North Star executed, acknowledged and delivered to Gillis a mortgage covering certain real and personal property owned by North Star. The real property consisted of Lot 7 of Block H of the Townsite of Nome, Alaska, and will hereafter be referred to generally as the "mortgaged property" or "North Star's property."

This mortgage was dated September 15, 1954 and was filed for record in the Recorder's office at Nome on or about March 30, 1955 as Instrument No. 89848.[4]

2. The Bank's First Mortgage.

The Gillis mortgage above referred to was made expressly subordinate to the lien of a first mortgage of the same property from North Star to the Bank (R. 88-89). This first mortgage was dated at the same time, i.e., September 15, 1954, secured a loan from the Bank to North Star in the amount of $38,000.00, and was recorded on September 15, 1954 as Instrument No. 89669.[5]

3. Payment of North Star-Gillis Note; Release of Gillis Mortgage.

In the latter part of January, 1957, Gillis, the North Star partners and James G. Manning, executive vice-president of the Bank, met together in the Bank's offices. This meeting resulted, among other things, in the following:

(a) Gillis agreed in writing to sell to the Bank all of Gillis' right, title and interest in and to his sec-

[4]Gustafson deposition (R. 88-89).

[5]Manning deposition (R. 50-51).

ond mortgage from North Star, in consideration of the payment to Gillis of the sum of $15,000.00. This payment was made and accepted by Gillis in full satisfaction of the North Star note to Gillis of $19,-854.83, plus interest.[6]

(b) The Bank paid Gillis the $15,000.00 at this time, and Gillis delivered to the Bank his assignment of all of his right, title and interest in and to the mortgaged property.[7] At the same time Gillis executed, acknowledged and delivered a satisfaction of his mortgage from North Star, and this was duly recorded as Instrument No. 90533 on or about January 31, 1957.[8]

4. Release of Bank's First Mortgage—Execution of New Mortgage to Bank.

The payment of the $15,000.00 to Gillis constituted a new loan in that amount from the Bank to North Star which was added to the balance of the existing indebtedness of the latter to the Bank. Consequently, at the time the $15,000.00 payment was made to Gillis, North Star gave to the Bank its promissory note in the sum of $110,000.00. The Bank's first mortgage of September 15, 1954 was released and the release recorded (Instrument No. 90530—January 31, 1957); and North Star then gave to the Bank a new mortgage of the same property as security for the increased total indebtedness of $110,000.00. This new mortgage from North Star to the Bank was dated January 22,

[6]Manning deposition (R. 53-54); Gustafson deposition (R. 90-91).
[7]Manning deposition (R. 56-57).
[8]Gustafson deposition (R. 91).

1957, and was recorded on January 25, 1957 as Instrument No. 90525 in Vol. 237 of Mortgages, at pp. 25-30.[9]

At this point an important fact should be noted: If Gillis had not previously recorded a satisfaction of his second mortgage on North Star's property, or if for some reason or other Gillis' satisfaction of mortgage which was recorded did not actually effect a release and satisfaction of the Gillis mortgage, then it is clear that the Bank's mortgage lien became junior to the mortgage lien of Gillis—because the Bank had released its prior first mortgage, and its second mortgage in the amount of $110,000.00 was made after the Gillis mortgage of September 15, 1954.

5. The Wallace Action—Attachment and Judgment.

(a) The Attachment of the North Star-Gillis Note.

In the meantime Gillis had been sued on a cause of action not related to these transactions. The plaintiff in this action (Civil Action No. 4107) was Joseph Wallace, and he had a writ of attachment issued on May 5, 1956. On May 15, 1956, the U. S. Marshal levied the writ by attaching the North Star promissory note to Gillis (R. 18, 44). The Marshal at this time took possession of the note from Gillis, and at no time subsequent thereto did Gillis have possession of or control over that instrument.

Thus, at the time subsequent to these transactions that Gillis accepted from the Bank the $15,000.00 in full payment and satisfaction of the indebtedness rep-

[9]Manning deposition (R. 57-60).

resented by the note, Gillis did not have the note in his possession and, moreover, had no right to its possession. And, more important, he knew of this situation and said nothing about it to the Bank or North Star—probably knowing all too well that if the facts had been disclosed, he would not have received the $15,000.00.[10]

(b) Wallace's Judgment Against Gillis.

In the Wallace action a money judgment was entered against Gillis on April 25, 1957. Among other things, the judgment provided as follows:

> "It Is Further Ordered, Adjudged and Decreed, that the U. S. Marshal at Nome, Alaska, sell, at public auction, that certain promissory note executed by Ernest H. Gustafson and Robert H. Renshaw, d/b/a North Star Bakery, in favor of defendant for the sum of Nineteen Thousand, Eight Hundred Fifty-Four and 83/100's ($19,854.83) Dollars, now in the possession of the said Marshal and the same hereby is ordered sold in accordance with law, together with all of the interest of the said defendant in and to Lot Seven (7) of Block 'H' of the Townsite of Nome, Alaska, by reason of that certain real and chattel mortgage securing said debt, recorded in the office of the U. S. Commissioner of the Cape Nome Precinct, Second Division, Alaska, as Instrument No. 89,849, and that a good and sufficient title to the said instrument and property be executed and delivered by the said U. S. Marshal to the purchaser thereof." (R. 18-19, 44.)

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[10]Manning deposition (R. 60-61); Gustafson deposition (R. 93).

Thus, the North Star note which Gillis had received $15,000.00 for was now to be sold. In addition, Gillis' interest as mortgagee in the North Star property which Gillis had assigned to the Bank, and in respect to which a satisfaction of mortgage had been given by Gillis, was also to be sold. The Marshal was directed to sell this property, that is, the note and Gillis' interest or equity as mortgagee in the mortgaged property, and give to the purchaser at such sale a "good and sufficient title" to such property (R. 19, 44).

6. Marshal's Sale of North Star-Gillis Note and Gillis' Interest as Mortgagee in North Star Property.

It was no wonder, then, when execution was issued on the Wallace judgment and notice of sale given by the Marshal,[11] that North Star notified the Marshal that the note had been paid for and purchased by North Star some time previously when the $15,000.00 had been paid to Gillis; and that North Star, therefore, had the right to possession of the note, and furthermore, that the mortgage from North Star to Gillis had been released and satisfied.[12]

However, North Star's third party claim was of no avail. The Marshal sold the property, as advertised, on or about June 29, 1957; and Wallace, the judgment creditor of Gillis, was the successful bidder at such sale for the sum of $11,225.00. The Marshal delivered the note to Wallace and gave him an "Assignment and

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[11] (R. 19, 30-31, 44); Gustafson deposition (R. 94).

[12] (R. 34-35); Gustafson deposition (R. 94-95).

Bill of Sale'' which certified that the Marshal had sold to Wallace the following:

(a) The promissory note from North Star to Gillis in the sum of $19,854.83; and

(b) All of the interest of Gillis in and to Lot 7 of Block H, Townsite of Nome, Alaska, by reason of the mortgage of September 15, 1954 from North Star to Gillis.[13]

7. Redemption of Note and Interest in Mortgaged Property by Bank and North Star.

It is pointed out later in this brief that Wallace was a holder in due course of the note which he purchased at the Marshal's sale, and that any person to whom he might have transferred the note would have the same rights as such holder. The security for this note had been the September 1954 mortgage to Gillis of North Star's property which was now covered by a later mortgage given by North Star to the Bank. By the terms of the judgment in the Wallace action, and the ensuing sale by the Marshal on execution, Gillis' release and satisfaction of his mortgage was, for all practical purposes, declared to have been ineffective; for the judgment clearly stated that Gillis' interest in North Star's property as mortgagee thereof was something that still existed and could be levied upon. And, in fact, it was levied upon and sold by the Marshal to Wallace. The effect of this, then, was to ''reactivate'' the lien of the Gillis mortgage and

[13](R. 21, 36-37, 45).

advance it to a position superior to the lien of the Bank's mortgage of January 31, 1957.

Thus, after the Marshal's sale, Wallace or any transferee of his was able to demand payment of a debt against North Star in excess of $19,000.00, and at the same time was able to enforce payment by reason of being in the position of a first mortgagee of North Star's property.

The Bank was in a precarious position. Its debtor, North Star, owing the Bank about $110,000.00, might easily have been pushed into insolvency or bankruptcy if Wallace or a transferee of his obtained judgment against North Star in excess of $19,000.00. Moreover, the Bank no longer had the security which it thought it had, for its mortgage was now junior and subordinate to the Gillis mortgage because of the terms of the judgment that Wallace obtained against Gillis.

Gillis had been responsible for this situation, and had the obligation, both legal and moral, to indemnify North Star and the Bank against this potential financial disaster that both of the latter faced. But even though demands were made of Gillis to take some action, he refused to do anything.[14] Consequently, the Bank did the only thing that it could do under the circumstances; after giving appropriate notice,[15] it redeemed the note and mortgagee's interest in the

[14]Manning deposition (R. 67-68); Affidavit of April 10, 1958, of James A. von der Heydt (R. 101-108).

[15](R. 37-38); Manning deposition (R. 64-65).

North Star property by paying Wallace the sum of $11,225.00.[16]

8. Conclusion.

The foregoing statement of facts shows the basis for the Bank's counterclaims against Gillis. The note had already been attached when Gillis was paid $15,000.00 for it in January 1957; and therefore such payment could not constitute a discharge of the note. Had the facts been revealed by Gillis and known by the Bank and North Star, then the payment to Gillis would not have been made. Thus, this is a clear case of a payment made under the influence of mistake, and a case where it would be inequitable to permit Gillis to retain the benefits of such payment.

The Bank was entitled to recover the sum of $11,225.00. The facts show that when the Bank paid Wallace this sum, this was a payment that Gillis, in equity and good conscience, ought to have made. Gillis had been unjustly enriched at the expense of the Bank, and therefore the latter was entitled to restitution from Gillis to that extent.

This is also true on equitable principles of subrogation. Wallace set the price on the note and property interest as $11,225.00 because this was the balance due him on his judgment against Gillis.[17] This payment had the effect of paying off the judgment—thus relieving Gillis from this obligation. The Bank, not being a mere volunteer in making such payment, was

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[16](R. 39-40); Manning deposition (R. 66-67).

[17]Affidavit of von der Heydt of April 10, 1958 (R. 106).

subrogated to Wallace's rights as they then existed, and was therefore in a position to enforce the judgment against Gillis to the extent of $11,225.00.

QUESTIONS PRESENTED.

Under the provisions of Rule 56 of the Federal Rules of Civil Procedure, the Bank was entitled to summary judgment and recovery against Gillis on its counterclaims—

> "... if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Thus the two questions for determination are:

1. Was there any genuine issue as to any material fact?

2. If not, then was the Bank, as a matter of law, entitled to judgment against Gillis on its counterclaim?

SUMMARY OF ARGUMENT.

1. In his reply to the Bank's counterclaims, Gillis has admitted nearly all of the material facts which establish the basis for the Bank's judgment. Those which were not admitted, and which were denied (either generally or because of lack of sufficient knowledge or information) have been established as true by evidence produced by Bank, i.e., the deposi-

tions of Manning and Gustafson, and the affidavit of James A. von der Heydt. Gillis failed to offer counter-affidavits or other materials that would tend to controvert that which the Bank had established as true, and he has not specified any opposing evidence that he could have adduced which might reasonably have changed the result. Thus, there was no credible issue of fact to be tried, and the action of the District Court in granting summary judgment for the Bank was proper.

2. The Bank paid Gillis $15,000.00 for the purpose of discharging an obligation of North Star to Gillis which was represented by a negotiable promissory note. At the time of payment, the Bank was ignorant of the fact that the payment did not discharge the note because of a prior attachment of the instrument by Wallace, a judgment creditor of Gillis. The note became an enforceable obligation in the hands of Wallace, a holder in due course. Because of circumstances surrounding the judgment obtained by Wallace against Gillis, and the business affairs between and among Gillis, North Star and the Bank, the Bank's security (a mortgage from North Star to the Bank) was endangered. The Bank was obliged to redeem the note by paying Wallace the sum of $11,225.00; and this payment had the effect of discharging and satisfying to that extent Wallace's judgment against Gillis.

Gillis, by having his debt to Wallace so paid, was enriched to the extent of such payment. This enrichment was unjust, because it would be inequitable to

permit Gillis to retain this benefit—after he had previously accepted $15,000.00 in full payment of the negotiable note. The Bank, therefore, is entitled to restitution from Gillis of the $11,225.00; for it is an established principle of equity that one who has been unjustly enriched at the expense of another is required to make restitution to the other.

The District Court, then, was correct in holding that the Bank, as a matter of law, could have judgment against Gillis.

ARGUMENT.

1. THERE WAS NO CREDIBLE ISSUE OF FACT TO BE TRIED.

Nearly all of the material facts which established the basis for the Bank's recovery on its counterclaim are admitted in Gillis' reply (R. 43-47). Those which were not admitted, and which were denied either generally or because of lack of sufficient knowledge or information, have been established as true by the depositions of James G. Manning and Ernest H. Gustafson, and by the affidavit of James A. von der Heydt. The court below has pointed this out in its oral decision (R. 116-118).

Furthermore, Gillis does not challenge this—either in his statement of points (R. 143), in a specification of errors (of which there is none), or in argument in his brief. He does not contend that the facts alleged by the Bank in its counterclaim are not true; his sole argument rests upon purported facts contained in paragraphs IV and V of his amended complaint (R.

7), and which, for the most part, were denied by the Bank (R. 14).

Gillis says that when he made the assignment to the Bank of his contract with the City of Nome (R. 10-12), the Bank agreed that—

> ". . . no other claim or setoff or debt should be charged against the proceeds of said assignment and that only advances made by the Defendant shall be reimbursed by virtue of a receipt of any money under the assignment and that any excess or balance over and above the advances of the Defendant shall be paid to the Plaintiff immediately upon receipt of the proceeds under the said assignment." (R. 7-8.)

Thus, the whole theory of appellant's case is this:

(a) Gillis had a construction contract with the City of Nome, Alaska, which called for the payment to him by the City of a sum in excess of $41,000.00.

(b) Gillis assigned to the Bank under this contract—

> ". . . any and all amounts now due or owing, or which may hereafter be or become due or owing, or remain unpaid at any time or times by the City of Nome, Alaska, to assignor . . ."

Furthermore, it was provided that—

> "This assignment is made and entered into to secure and provide for the payment of *any and all obligations now due or owing or which may hereafter be or become due or owing* by the undersigned Assignor to the Bank." (Emphasis added.) (R. 12.)

(c) Despite the express wording of the assignment, Gillis asserts that there was an oral agreement that the written contract of assignment did not mean what it said at all—i.e., that the assignment was not really made to secure the payment of "any and all obligations now due or owing or which may hereafter be or become due or owing" by Gillis to the Bank (R. 12).

(d) Because of this purported contemporaneous oral agreement, which modified, and even contradicted, the unambiguous provisions of the written instrument, it is appellant's theory that the Bank had no right to retain for itself from the assigned funds the sum of $11,225.00, despite the fact that by reason of Gillis' unjust enrichment, this sum could be lawfully claimed by the Bank from Gillis in an action based upon the equitable theory of restitution. In other words, the Bank was supposed to have paid over the $11,225.00 to Gillis at the same time that it had a valid claim in that amount against Gillis, and then after that brought suit on such claim.

This theory of the case as advanced by appellant is not sound. In answer to the amended complaint, the Bank denied the existence of such an oral modification of the contract of assignment (R. 14). And the testimony of James G. Manning, executive vice-president of the Bank, negatives the theory now advanced by Gillis. Mr. Manning testified that Gillis had instructed him to "hold" this money until he could discuss the matter with his attorney, and that after giving such instructions to Manning, Gillis never returned to the Bank to discuss the matter any further

(R. 70). Moreover, after this conversation had taken place, Gillis' attorney, Mr. Crane, discussed this matter with Manning, and mentioned to the latter that he would like to have the Bank apply the $11,225.00 as a credit on a prior and still existing mortgage loan from the Bank to Gillis (R. 73). Certainly, this testimony serves to discredit the theory now proposed by Gillis—that such funds were to be promptly paid to him and not to be used as credit against other claims or set-offs or debts that might be owing from Gillis to the Bank (R. 7).

Gillis made no effort to controvert Manning's testimony. The deposition was taken pursuant to a stipulation entered into between counsel for Gillis and for the Bank (R. 84), and Gillis did not even cross-examine the witness. There was not produced any counter-affidavit or deposition of Gillis, and the only matters filed by him in opposition to the motion for summary judgment were the affidavits of Robert A. Parrish (R. 109) and of Gillis' counsel, Fred D. Crane (R. 112). Neither affidavit touched on the subject of the disposition of the assigned funds, and thus neither served to discredit the testimony of the Bank's witness on this point.

The deposition of Manning must be taken at its face value. It establishes the lack of a triable issue on this aspect of the controversy. What the witness has testified to has not been discredited by Gillis—or even explained or denied by him. Since Gillis has failed to offer counter-affidavits or other materials that raise a credible issue, and has not at least specified

some opposing evidence that he could have adduced which might reasonably have changed the result, the granting of the Bank's motion for summary judgment was entirely proper. *Lindsey v. Leavy,* 149 F. 2d 899, 902 (CA-9 1945); *Byrnes v. Mutual Life Insurance Company,* 217 F. 2d 497, 500-501 (CA-9 1955); *James v. Honaker Drilling, Inc.,* 254 F. 2d 702, 706 (CA-10 1958); *Moore's Federal Practice,* Vol. 6, Sec. 56.11 (3), pp. 2067-2073.

The authorities cited by Gillis in support of his argument that there was a genuine issue to be tried (Appellant's Brief, pp. 3-6) are perfectly sound cases, and the Bank does not quarrel with their holdings. But they are of no assistance to Gillis because of the essential differences between the factual situations, there and here. In the cases referred to there were in fact triable issues that had been raised, not only by the pleadings, but also by affidavits and other evidence; whereas in the case being considered here, there were no such issues of fact for trial.

It is true, as Gillis states, that his complaint—

> ". . . recites as cause one of the action that the assignment was a separate and distinct transaction and was delivered to the appellee under certain conditions; that Appellee has accepted such an assignment with the clear understanding that upon the performance and completion of the work called for under the school contract by the Appellant, and the Appellee being reimbursed for the specific advances made against such an assignment, any monies over and above the Appellee's advances were to be remitted to the Appellant." (Appellant's Brief, page 5.)

But a mere recitation of something does not serve to foreclose summary disposal of the case where the truth of the alleged facts recited are discredited by depositions of the adverse party, and where the appellant fails to come forth with something that would serve to verify that which is contained in his complaint.

The assignment was made in March 1957 (R. 10-12). It was in August of that year that the discussion took place between Gillis and Manning, where the latter was instructed to "hold" the $11,225.00 (R. 70). And it was even later, in October, that Gillis' counsel, Mr. Crane, suggested that the money be used as a credit against other indebtedness owing by Gillis to the Bank (R. 73).

Thus, even assuming that there had been a contemporaneous, oral modification of the contract of assignment, the evidence shows that subsequent to this Gillis had waived his purported right to have the assigned funds paid to him without regard to other obligations that he owed to the Bank. This has not been denied or controverted in any fashion by Gillis, even though there was ample opportunity for him to specify some opposing evidence that he might have had. This is precisely the type of situation that calls for the application of the remedy of summary judgment.

This demonstrates that the factual statement set out in Gillis' brief (pp. 1-3) is not accurate. The judgment that was secured by the Bank was not based solely on affidavits and depositions taken of the Bank's

witnesses (Appellant's Brief, p. 2), but rather was based almost entirely on the admissions contained in the pleadings. The District Court did consider the depositions and the affidavits of both parties, as is permitted by Rule 56. But it found from this consideration, and from the pleadings, that the only issue of fact controverted was that relating to the claimed knowledge of the officers of the Bank of the attachment of the note; and the court found this to constitute no genuine issue of material fact (R. 116-118, 121).

It also is not true that the assignment by Gillis to the Bank was not considered by the court below, or that Gillis was deprived of his right to submit proof as to what he terms the "true understanding between the parties." (Appellant's Brief, p. 3). The fact is that the legal effect of the assignment was fully considered by the District Court (R. 119). And, as pointed out above, Gillis did not avail himself of the adequate occasion afforded him to produce evidence on this subject by way of depositions or affidavits.

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2. THE JUDGMENT FOR THE BANK WAS CORRECT AS A MATTER OF LAW.

Gillis appears to rely wholly upon the argument that the assignment was made on the sole understanding that moneys in excess of funds advanced by the Bank on Gillis' contract with the City of Nome were to be paid to him—regardless of other transactions between the parties. He does not argue that if such

"other transactions" did give rise to the Bank's right of set-off, that he was not indebted to the Bank on the basis of his obligation to make restitution in accordance with the Bank's counterclaims in this action.

Thus, one might assume from this that Gillis admits the validity of the Bank's claim for restitution, and in effect, that the Bank might have judgment against Gillis on its counterclaim—provided, that the judgment is not satisfied by the application of the $11,225.00 which had been retained by the Bank from the assigned funds.

If this is a correct assumption to make, then the Bank need not proceed beyond this point in its answering brief. But in the event that the court wishes, nevertheless, to consider the legal theory of the Bank's claim against Gillis, then the following additional argument may be considered.

(a) The Payment to Gillis of $15,000.00 Was Made Under Influence of Mistake of Fact.

When the Bank paid the $15,000.00 to Gillis on or about January 30, 1957, it is uncontroverted that such payment was made in the belief that the North Star-Gillis note for $19,854.83 was thus paid in full. If this had not been the belief of North Star and the Bank, then it is obvious that the Bank would not have paid out the $15,000.00 to Gillis and, at the same time, make this a loan to North Star. This is borne out by the direct testimony of Manning,[18] the executive vice-president of the Bank, and by the testimony of Gus-

[18]Manning deposition (R. 61-63).

tafson,[19] one of the North Star partners. And it is an obvious inference from the admitted facts; for no one, particularly a commercial institution like the Bank, would reasonably be expected to pay $15,000.00 in full satisfaction of a negotiable promissory note if it knew that the payee did not have control over the note and was unable to effect its discharge.

Therefore, this payment was made under influence of a mistake of fact, caused by the failure of Gillis to notify the Bank and North Star that he did not have possession of the note, that it had been attached by the U. S. Marshal, and therefore, that the $15,000.00 payment could not discharge the obligation. This was a breach of a duty of good faith that a holder of a note owes to the payor. See *Restatement of Restitution,* Sec. 34, p. 140.

The case of *Tarascio v. Mancuso,* 3 NW 2d 400, 402 (Neb. 1942), establishes the rule of law that supports the Bank's position. In that case the payee of a note had received payments from the maker. However, at the same time that these payments were made, the maker's obligation to the payee had been satisfied by payments made by a third party. This, of course, was unknown to the maker until after he had also paid the obligation.

The court allowed the maker of the note to recover payments he had made to the payee. The court said that where money is paid to another under influence of mistake, i.e., upon the supposition that specific

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[19]Gustafson deposition (R. 92-94).

facts are true, which would entitle the other to the money, and the money would not have been paid if it had been known to the payor that the facts were untrue, that an action will then lie to recover back such money.

That is the precise situation here. The Bank paid Gillis $15,000.00 upon the supposition that this payment constituted full payment and discharge of a promissory note for over $19,000.00. If this had been true, then clearly Gillis, the payee of the note, would have been entitled to the money. But this supposition was erroneous, because the obligation could not be discharged by such payment; and if the Bank had known that, the payment would not have been made. Therefore, the Bank either in its own right, or as assignee of North Star,[20] may have recovery against Gillis.

Explicit authority for the Bank's position is contained in the American Law Institute's Restatement of Restitution. Sec. 24 (1) states:

> "Unless it is otherwise agreed, a right to restitution exists in favor of a person who, erroneously believing because of a mistake of fact that another has a right, title, or power, other than an interest in land, and induced by such mistake has paid money to the other in exchange for the transfer of or promise to transfer the right or title or for the exercise of or the promise to exercise the power, if because of the non-existence of such right, title or power, the payor fails to receive what it was agreed he should receive."

[20] (R. 41-42); Gustafson deposition (R. 97-98).

On page 112 of the Restatement the following illustration of the rule is given:

> "2. A owes B $100. This debt is garnisheed by C. B assigns the debt to D for $80, both B and D being in ignorance of the garnishment proceedings which entitle C to receive payment from A. D is entitled to restitution of $80 from B."

This illustration, "translated" to fit the facts in this case, results in the following:

> North Star owed Gillis $15,000.00. This debt is garnisheed by Wallace. Gillis assigns the debt to the Bank,[21] both Gillis and the Bank being in ignorance of the garnishment proceeding, which entitles Wallace to receive payment from North Star. The Bank is entitled to restitution from Gillis.

Assuming that this had been the complete factual situation, the Bank would be entitled to restitution from Gillis, because—

> (a) The Bank erroneously believed, because of a mistake of fact, that Gillis had the right or power to cancel the debt and discharge the negotiable note.
>
> (b) Induced by such mistake, the Bank paid the money to Gillis in exchange for the transfer of the right or title that Gillis had to the note.
>
> (c) That supposed right, title or power of Gillis was, in fact, non-existent because of a prior attachment of the note, and therefore the Bank

[21] Defendant's Answer—Ex. 3.

failed to receive what it was agreed that it should receive.[22]

The illustration noted above shows that the Bank would be entitled to restitution from Gillis if the latter had been ignorant of the attachment proceedings. But here Gillis knew that he had no title to the note or power or right to discharge it, because instead of garnishing the debt, Wallace had attached the note itself and had taken it from Gillis' possession with the latter's knowledge. In fact, Gillis admits in answering paragraph number 7 of the Bank's first counterclaim that he knew, when he received the $15,000.00 from the Bank, that the note had been attached and was not in his possession (R. 7, 44).

From the time of attachment, Wallace was deemed to be a purchaser in good faith for value (Sec. 55-6-67 ACLA 1949), and therefore he, and not Gillis, was entitled to receive payment on the note when the $15,000.00 was paid. Consequently, the facts in this case reveal a much stronger case for restitution than that shown in the above mentioned illustration found on page 112 of the Restatement of Restitution.[23]

The rule which permits the Bank to recover here is also stated in Corpus Juris Secundum.

> "In accord with the general rule stated in the title Payment Sec. 157, 48 C.J. p. 759 note 82, but subject to the limitations hereinafter set

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[22]Restatement of Restitution, supra, Sec. 24 (1).

[23]See also: Restatement of Restitution, Sec. 29, p. 129, where it is stated: "* * * Thus a person is entitled to restitution if, because of a mistake of fact, he . . . purchases a note from a person who has no power to transfer it . . ."

> forth, ordinarily one paying a negotiable instrument under a mistake of fact may recover such payment from the person receiving the same, unless the circumstances are such that the latter may in good conscience retain the payment. While the payment may certainly be recovered if no negligence can be imputed to the payor in making the payment, it has been held that there may be a recovery regardless of any negligence on his part, if the position of the person to whom payment was made has not thereby been changed to his prejudice."[24]

There are certainly no circumstances here which will permit Gillis "in good conscience" to retain the payment—particularly in view of the fact that because of his lack of title to the note at the time it was paid, he later received a benefit in having $11,225.00 paid by the Bank in satisfaction of the judgment against him which had been obtained by Wallace.

To summarize this portion of the Bank's argument, and placing the Bank in the place of North Star by virtue of the latter's assignment of its rights against Gillis[25], the situation is this: the maker of a negotiable promissory note made payment of the note to the payee after transfer of the instrument to a bona fide holder in due course (Wallace). In this situation the maker may recover this payment from the payee (10 CJS, Bills and Notes, Sec. 467h, p. 1012).

A case directly in point is that of *Newhall Savings Bank v. Buck,* 197 NW 987 (Iowa 1924). There M

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[24]10 CJS, Bills and Notes, Sec. 467h, pp. 1011-1012.

[25]Gustafson deposition (R. 97-98).

(the maker) gave his note to P (the payee), who in turn endorsed it and transferred it to X. X then endorsed and transferred the note to Y for value. After these transactions had occurred, M paid the amount of the note to P, believing that the note was then in the hands of X. Y, the last holder and the plaintiff in the action, brought a suit on the note against M, and M sought in the same suit to recover from X.

The court allowed recovery by Y against M—recognizing the settled doctrine that payment of a negotiable note to the payee after negotiation is not binding upon the transferee if the latter is a holder in due course—except where the payee is agent for the holder and authorized by the latter to recover payment.[26]

However, the judgment of the lower court was reversed in part and the case remanded for a new trial. This was done so that the jury could decide whether, when M paid the amount of the note to P, he was making such payment to P as agent for X—intending that, actually, payment should be made to the person he then thought to have the note, i.e., X.

The appellate court stated that if X had received the payment and had failed to apply it on the note, then he would be liable to M. This case, therefore, is authority for the proposition urged here by the Bank —that if a maker pays the payee and the latter fails to apply payment on the note (which Gillis failed to do), then the maker can recover such payment from the payee.

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[26]A statement of this rule will be found in 103 ALR 653, 656-657.

(b) The Bank Is Entitled to Restitution of the $11,225.00 Paid to Wallace.

It has been pointed out earlier in this brief that the Bank paid Wallace $11,225.00 for the North Star-Gillis note and Gillis' interest as mortgagee in the North Star property; that this payment was not made officiously but rather, under legal compulsion; that because Gillis had previously received $15,000.00 in payment of the note and for a release of his mortgagee's interest, the payment to Wallace by the Bank was a payment which Gillis, in justice, ought to have made; and that since the Bank's payment to Wallace relieved Gillis of paying, to that extent, the judgment that Wallace had obtained against him, Gillis had a distinct benefit conferred upon him by the Bank.

The court below has held that the Bank was not entitled to judgment on its first counterclaim for the sum of $15,000.00 paid to Gillis to satisfy the note—the reason being that there had been a complete accord and satisfaction between the Bank and North Star for the indebtedness represented by the note (R. 118-119). The Bank has no quarrel with this determination.

The court below, however, did hold that the Bank was entitled to recover the $11,225.00 which it had been forced to pay to Wallace, the judgment creditor of Gillis (R. 119-120). The Bank submits that this decision was correct; that it was entitled to restitution from Gillis of that amount because Gillis had been unjustly enriched to that extent at the Bank's expense.

Gillis might contend that when the Bank purchased the note from Wallace for $11,225.00 it acted voluntarily or "officiously", i.e., without legal compulsion, because Wallace did not then own an enforceable obligation. The basis for this argument will possibly be that when Gillis was paid the $15,000.00, it was at a time when he owned the note and was entitled to payment; therefore, this payment constituted a discharge of the instrument.

But in so arguing, Gillis will overlook the fact that before the first installment of the note had matured, it had been attached by legal process. First of all, the attachment was valid, for the note itself was subject to attachment and it was not necessary to garnish the debt. The Alaska attachment statute states that—

> "Personal property capable of manual delivery to the Marshal, and not in the possession of a third person, shall be attached by taking it into his custody" (Sec. 55-6-66 ACLA 1949).

The Supreme Court of Oregon, in construing a similar statute in a case involving the same factual situation, has said:

> "* * * It is obvious that, in specifying the class of property subject to attachment, by the Sheriff taking the same into his custody, the statute was intended to include instruments of this character (a negotiable promissory note)."
>
> *Fishburn v. Londershausen,* 92 P. 1060, 15 Ann Cases 975 (Oreg. 1907).
>
> See also: Annotation in 41 ALR 1003, 1007, *et seq.*

Secondly, the Alaska statutes on attachment also provide that—

> "From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached . . ." (Sec. 55-6-67).

When the Wallace writ of attachment was executed on May 15, 1956, Gillis was the owner of a negotiable promissory note in the amount of $19,854.83. The note was complete and regular on its face, it was not overdue, it had not been dishonored, and there was no infirmity in the instrument, and it had not been paid. Consequently, when Wallace eventually got physical possession and title to the note at the Marshal's sale on June 29, 1957, he acquired whatever rights Gillis had had in the note *at the time of attachment,* i.e., May 15, 1956. See 7 CJS, Attachment, Sec. 239, p. 413. And since Wallace, by the terms of the attachment statute, was deemed to be a purchaser in good faith and for value as of the date of attachment, it is clear that he became a holder in due course of this negotiable instrument (Uniform Negotiable Instruments law—Sec. 27-1-72 ACLA 1949). As such, he held—

> ". . . the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and *may enforce payment of the instrument for the full amount thereof* against all parties liable thereon" (Emphasis added) (Sec. 27-1-77 ACLA 1949).

And even in the absence of an explicit statute such as Sec. 55-6-67, there is good authority for the proposition that Wallace would be a holder in due course because he was a purchaser at a judicial sale. In Beutel's "Brannan Negotiable Instruments Law", 7th Ed., p. 828, it is said:

> "In Middle Tennessee Bank v. McKennon (Tenn.), 99 SW 2d 564, criticized in 14 Tenn. L. Rev. 631, it was held that a purchaser at a judicial sale could not be a holder in due course. It is submitted that the case is wrong. An instrument does not lose its negotiability simply because it becomes part of a judicial proceeding. A proper result was reached in Puissecur v. Yarbrough, 164 P. (2d) 42, affirmed by the Supreme Court [Cal. (2d)], 175 P. (2d) 830."

In the above mentioned case of *Puissecur v. Yarbrough,* 164 P. 2d 42, affirmed in 175 P. 2d 830, a note was in possession of a bank for collection. On June 19, 1940, a writ of execution was issued on a judgment which had been rendered against the payee of the note, and such writ was served on the bank. At this time the note was not delivered to the Sheriff. Then on September 15, 1940, the payee of the note assigned it to X. Later the note was delivered to the Sheriff who then sold it to the plaintiff. Plaintiff brought a suit on the note against the maker. The maker defended on the ground that he had paid the amount of the note to X (the assignee of the payee).

The court said that since the assignment to X took place *after* levy of execution, X could not claim any greater rights by virtue of the transfer than the payee

had at that time. It was held that X took the assignment from the payee subject to plaintiff's rights under the lien of the levy of writ of execution. Therefore, the maker of the note, although having made payments to the assignee, was in default on the note as his liability was not discharged by payments made to the assignee, X.

The net effect of this decision is that the purchaser of the note at the Sheriff's sale was a holder in due course, and had the right to enforce payment against the maker.

Similarly, Wallace became a holder in due course of the North Star-Gillis note. He had the right, and any transferee of his would also have the right,[27] to enforce payment of the note for its full amount against North Star. There was no escape from this.

To say the least, the Bank's position was unenviable. A negotiable promissory note which the Bank had thought was discharged in January 1957 suddenly turned up as an enforceable obligation in the hands of a holder in due course. North Star already was indebted to the Bank in excess of $100,000.00 and was not in particularly good financial condition. A judgment by Wallace, or by a transferee of his, against North Star in excess of $20,000.00 possibly would have been enough to put North Star in bankruptcy or insolvency, and the chances then of the Bank obtaining regular payments on the $100,000.00 indebtedness from North Star would be nil.

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[27]See Sec. 27-1-78 ACLA 1949, "Rights of Transferee of Holder in Due Course."

But more serious was the danger to the Bank's security which consisted of a mortgage made in January 1957 on North Star's property. The Bank previously had been the senior encumbrancer of this property under its mortgage of September 1954. But relying on the assignment from Gillis and the release of his second mortgage at the time he was paid the $15,000.00[28], the Bank released its prior mortgage and took a new one from North Star in January 1957.[29] Then under the terms of Wallace's judgment against Gillis, followed by the Marshal's sale on execution, the Bank was faced with an alarming fact: the Gillis mortgage had been "revived" by virtue of Wallace's attachment, judgment and execution. It was no longer a "second" mortgage, but now was superior; because it was prior in time to the Bank's mortgage of January 1957.

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Restatement of Restitution,* Sec. 1, p. 12. Gillis was "enriched" by the Bank's $11,225.00 payment to Wallace, because Gillis thus had his debt to Wallace satisfied to the extent of that payment. Thus, there is no doubt that the Bank conferred a distinct benefit on Gillis.

Gillis' enrichment was unjust because the facts show that he received this benefit in such circumstances that it would be inequitable to permit him to

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[28]Manning deposition (R. 55-56); Gustafson deposition (R. 90-92).

[29]Manning deposition (R. 57-60).

retain it.[30] He had received $15,000.00 for the note at a time when he had no title or right to that instrument, i.e., when Wallace, by virtue of the Alaska attachment statute, had "purchased" the note in good faith and for a valuable consideration. Solely because of this happening, the Bank was compelled later to pay off Gillis' debt to Wallace to the extent of $11,225.00. Certainly, it would be inequitable to allow Gillis to retain the benefit under these circumstances. If the Bank was obliged to pay Wallace $11,225.00 because Gillis had taken $15,000.00 for a negotiable promissory note that he had no right to or power to discharge (and this is what happened), then in good conscience Gillis, and not the Bank, is the one who ought to have paid this debt to Wallace.

And the circumstances related above show that the Bank was not a mere volunteer—that it was not acting officiously in making the payment to Wallace. What else was it to do, when the only way it could protect its mortgage security was to have assigned to it by Wallace the note and the mortgagee's property right that Wallace had obtained at the Marshal's sale?

The Bank was actually compelled to pay this debt of Gillis, and under the accepted rule in such cases, where the debt is one which another in good conscience ought to pay, the Bank should be allowed to recover the payment from Gillis. See *Brandtjen & Kluge, Inc. v. Fincher,* 111 P. 2d 979, 981 (Cal. 1941). One does not act officiously when he acts from some legal

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[30]For general statement of rule see *Atlantic Coastline v. Florida,* 295 US 301, 309 (1935).

compulsion, nor when he acts from necessity to preserve his property. *City of Biddleford v. Benoit,* 147 Atl. 151, 155 (Maine 1929). Where one pays to protect his interest in property and to prevent it from being sold under foreclosure proceedings, he is allowed to recover the payment so made. *Peterson v. Howell,* 126 So. 363, 365 (Fla. 1930). And it is not necessary that the debtor request that payment be made, or that there be privity of contract between the parties. An action for money paid, or for restitution, is founded on equitable principles—the basis is the unjust enrichment that would result if Gillis is not compelled to reimburse the Bank for the payment made by the latter. *City of Biddleford v. Benoit,* supra, p. 155.

The principles which govern this case are stated in the *Restatement of Restitution,* particularly Secs. 1, 2, 3 and 43. There is no necessity to repeat them here. They clearly support the Bank's claim to recover from Gillis the $11,225.00 paid by the Bank to Wallace.

(c) The Doctrine of Subrogation Affords a Basis for the Bank's Recovery.

What has been said above with respect to the Bank's right to restitution from Gillis of $11,225.00, also gives rise to the Bank's right to recover on the equitable doctrine of subrogation. In the case of *Pittsburgh-Westmoreland Coal Co. v. Kerr,* 115 NE 465 (NY 1917), the New York Court of Appeals explained the doctrine as follows:

> "The remedy of subrogation is governed by principles analogous to those that govern actions to

recover money paid by mistake. Money paid on a negotiable instrument under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.

"Where . . . a payment with money of another, wrongfully obtained, operates to discharge a lien or a debt that is secured by collateral . . . the debt, may in equity be deemed alive for the benefit of the person whose money was so wrongfully used by the debtor, and such person may be subrogated to the rights of the one who owned the debt and the debt be deemed transferred and assigned to such person.

"The right of subrogation or of equitable assignment is not founded upon contract nor upon the absence of contract, but is founded upon facts and circumstances of a particular case and upon principles of natural justice, and generally where it is inequitable that a person furnishing money to pay a debt should be substituted for a creditor or in place of a creditor such person will be so substituted."

The subject is also discussed in the Restatement of Restitution, Sec. 162, pp. 653, *et seq.* And see also: 50 Am. Jur., Subrogation, Sec. 46, p. 711; 83 CJS, Subrogation, Sec. 14, p. 611.

It is clear that the Bank, then, is entitled to be subrogated to the rights of Wallace, the judgment creditor of Gillis. The Bank's property, consisting of $11,225.00, was used to discharge an obligation owed

by Gillis—its effect was to have Wallace's judgment against Gillis satisfied. The Bank, as it has been pointed out above, did not act officiously when making this payment. Although the judgment was thus satisfied by the payment of $11,225.00, equity will revive it so that there is created in the Bank and for its benefit a right which has the effect of placing the Bank in the position of Wallace before the judgment was satisfied. This right consisted of all the rights and remedies of a judgment creditor—particularly the right to have the judgment paid. The right which the Bank thus had ought to have been enforced, as it was by the judgment of the court below, in ordering that Gillis' property, the $11,225.00 which was in the Bank's possession, be applied by the Bank in satisfaction of the Wallace judgment against Gillis.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, May 12, 1959.

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